

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter  
of

Case No. 08-01789

SECURITIES INVESTOR PROTECTION CORPORATION

V.

BERNARD L. MADOFF INVESTMENT SECURITIES, et al.,

Debtors.

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April 13, 2010

United States Custom House  
One Bowling Green  
New York, New York 10004

In Re: Hearing in Trustee's entry into third  
amended and restated asset purchase agreement with Surge  
Trading Inc. f/k/a Castor Pollux Securities, Inc.

Trustee's application for preliminary injunction,  
enforcement of stop declaration that Canavan, Goldsmith and  
Kalman action is void ab initio and a Temporary Restraining  
Order.

B E F O R E:

HON. BURTON R. LIFLAND,

U.S. Bankruptcy Judge

1 A P P E A R A N C E S (Continued):

2

3 BAKER HOSTETLER, LLP

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6 New York, New York 10017

7 BY: BIK CHEEMA, ESQ.

8 -and-

9 DAVID J. SHEEHAN, ESQ.

10 -and-

11 MARC E. HIRSCHFIELD, ESQ.

12 -and-

13 KEITH R. MURPHY, ESQ.

14 SECURITIES INVESTOR PROTECTION CORPORATION

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A P P E A R A N C E S: (Continued)

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-and-

PETER W. SMITH, ESQ.

UNITED STATES DEPARTMENT OF JUSTICE

CIVIL DIVISION, TORTS BRANCH

Ben Franklin Station

Washington, DC 20044

BY: JEFFREY P. EHRLICH, ESQ.

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1 PROCEEDINGS.

2 THE COURT: SIPC versus Bernard L. Madoff  
3 Investment Securities.

4 MR. SHEEHAN: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. SHEEHAN: David Sheehan, from the law  
7 offices of Baker & Hostetler, on behalf of the Trustee.

8 We have several matters on the record. The  
9 first involves Surge Trading and I would ask my colleague,  
10 Mr. Cheema, to address the Court with regard to that  
11 matter.

12 THE COURT: Sure.

13 MR. SHEEHAN: Thank you.

14 MR. CHEEMA: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. CHEEMA: Good morning, Your Honor. My  
17 name is Bik Cheema. I am an attorney at Baker & Hostetler  
18 and I am appearing here today on behalf of the Trustee,  
19 Irving Picard, on his motion to authorize the Trustee's  
20 entry into a third amended and restated asset purchase  
21 agreement with Surge Trading Inc., formerly known as Castor  
22 Pollus Securities, Inc.

23 By way of brief background, this Court  
24 approved the sale of BLMIS's market making operations last  
25 year on April 30, 2009. The winning bidder was the

1 stalking horse bidder, Surge Trading Inc., Surge, who  
2 submitted the highest and best offer at auction. The sale  
3 closed on June 17, 2009 following the receipt of approval  
4 from the Financial Industry Regulatory Authority, FINRA,  
5 and Surge thereafter reopened the business.

6 Pursuant to the terms of the second amended  
7 and restated asset purchase agreement, dated April 29,  
8 2009, the prior agreement, Surge agreed to pay a purchase  
9 price which included a \$1 million closing payment and  
10 \$24,500,000 in earn-out payments through December 31, 2013.

11 In March 2010, having paid \$3,385.73 of the  
12 earn-out to the Trustee, Surge approached the Trustee  
13 regarding the possibility of amending the prior agreement  
14 because of the existence of certain regulatory issues that  
15 may have compromised Surge's ability to continue as a going  
16 concern.

17 Surge proposed an out of court  
18 reorganization whereby it would transfer substantially all  
19 of its assets and liabilities to a new wholly-owned  
20 subsidiary and the subsidiary would then become the  
21 successor broker-dealer and Surge would thereafter conduct  
22 the business through this subsidiary.

23 While this proposed reorganization would be  
24 advantageous from a regulatory standpoint, the Trustee was  
25 concerned that by bifurcating the operations of the

1 business from the entity which owes the earn-out to the  
2 Trustee, the subsidiary would not be liable to the Trustee  
3 for the earn-out and consequentially, the Trustee could  
4 then be exposed to an increased risk because the entity  
5 where the business resides would not be the entity that  
6 owes the Trustee significant, ongoing obligations under the  
7 earn-out.

8 After considerable, lengthy and good-faith  
9 negotiations, a mechanism was devised and agreed which  
10 protects the Trustee by mitigating the risk to the Debtor's  
11 estate, protecting the earn-out, increasing monies due to  
12 the Trustee and the estate for the benefit of all  
13 creditors, and ensuring the survival of Surge as a going  
14 concern.

15 Under the proposed reorganization,  
16 substantially all of the assets and liabilities of Surge  
17 will be pushed down in the newly-created subsidiary which  
18 shall operate the business going forward. Exercising his  
19 sound business judgment, the Trustee was able to mitigate  
20 the risk to the BLMIS estate by entering into several  
21 amendments to the prior agreement.

22 For example, the Trustee has agreed to  
23 several economic enhancements that will compensate the  
24 Trustee for any increased risk. These included extending  
25 the earn-out period by one year through and including the

1 conclusion of the calendar quarter ended December 31, 2014,  
2 thereby increasing the likelihood that the full amount of  
3 the earn-out will be paid. Surge Trading also agreed to  
4 the payment of a \$50,000 monitoring fee to the Trustee on a  
5 quarterly basis during the extended earn-out period in  
6 consideration of monitoring and oversight services provided  
7 by the Trustee.

8 Furthermore, the Trustee will be a  
9 third-party beneficiary to a license agreement with Surge  
10 whereby Surge will license to the subsidiary on an  
11 exclusive and irrevocable basis the acquired assets in  
12 exchange for a license fee paid by the subsidiary to Surge  
13 equal to 15 percent of the net trading revenue.

14 The license fee, when paid, will be used by  
15 Surge to pay the earn-out. Additionally, as collateral  
16 security for payment of the earn-out, the Trustee shall  
17 have a security interest in all net trading revenue of the  
18 subsidiary, which shall be deposited into an account  
19 pursuant to the deposit account control agreement. And,  
20 the Trustee shall have the right to immediately obtain a  
21 security interest in all issued and outstanding shares of  
22 the subsidiary if a default event arises due to the failure  
23 of Surge or the subsidiary to pay when due any earn-out and  
24 such default is not cured within 30 days.

25 Lastly, before the third amended and

1 restated asset purchase agreement, the amended agreement,  
2 shall become effective, the Trustee shall have received  
3 evidence, in form and substance reasonably satisfactory to  
4 the Trustee, that equity contributions in the amount of at  
5 least \$10,000,000 in the aggregate have been or will be  
6 made to Surge or the subsidiary prior to or substantially  
7 simultaneously with the consummation of the reorganization,  
8 and within ten business days following receipt by Surge or  
9 the subsidiary, of approval from FINRA of the change of  
10 control of the business, Surge shall cause additional funds  
11 of at least \$5,000,000 to be contributed to Surge or to the  
12 subsidiary.

13 On April 12, 2010, the Trustee and Surge  
14 filed with the Court the form of the proposed amended  
15 agreement, the APA, altering the prior agreement as  
16 discussed herein and more fully set forth in the motion.

17 Not only does the prior agreement permit  
18 amendment, but the Trustee has exercised sound business  
19 judgment as he attested to in his declaration annexed to  
20 the motion as Exhibit C, the "Picard Declaration", and as  
21 is required under Second Circuit case law.

22 In the interests of ensuring protection of  
23 the earn-out as argued here today and more fully in the  
24 motion, as well as to enhance the value of the estate for  
25 the benefit of the BLMIS estate and all of its creditors,



1 and thereby ensuring survival of the purchaser as a going  
2 concern, we conclude, Your Honor, by respectfully  
3 requesting that you enter an order, substantially in the  
4 form annexed to the motion, granting the motion and such  
5 other relief as may be just and proper.

6 THE COURT: Does anyone else want to be  
7 heard?

8 MR. BELL: SIPC is in support of the  
9 Trustee's motion.

10 THE COURT: As the presentation was being  
11 made it came to mind for me to ask one question. During  
12 the course of the discussion the answer to that was  
13 forthcoming. I was concerned that earn-out be  
14 collateralized and be collateralized in a better posture  
15 than the previous agreement. From this representation it  
16 appears that that is correct and, therefore, the Trustee's  
17 argument, that sound best judgment does not seem to be  
18 undermined. I will approve the arrangement.

19 MR. CHEEMA: Thank you Your Honor.

20 THE COURT: Do you have an order?

21 MR. SHEEHAN: I do.

22 THE COURT: I will entertain it.

23 MR. SHEEHAN: Sure. Thank you.

24 THE COURT: I have a record of the order.

25 MR. SHEEHAN: Your Honor, the other matter

1 on for this morning is the Trustee's request for the entry  
2 of a scheduling order with regard to the confirmation of  
3 certain determinations made by the Trustee with regard to  
4 claims that have been filed with him in the proceeding.  
5 Specifically, Your Honor, as the papers revealed there are  
6 a body of customers out there that are feeder funds. They  
7 are customers in the sense they have accounts with the  
8 Trustee.

9 Investors in those feeder funds, Your  
10 Honor, approximately 8,500 of them who did not have  
11 accounts with the broker-dealer but did have an investment  
12 with the feeder fund that did have filed claims with the  
13 Trustee suggesting they are entitled to SIPC protection and  
14 to be afforded the rights of a customer.

15 The Trustee has determined to deny those  
16 claims in the sense they are not a customer and, therefore,  
17 have no accounts and, therefore, are not entitled to  
18 protection.

19 Needless to say, there were a number of  
20 objections, approximately 2,000 to the Trustee's  
21 determination.

22 What we are seeking to do by virtue of our  
23 application today, Your Honor, is to have those 2,000 or  
24 approximately 2,000 objections heard by Your Honor in one  
25 forum.

1 We believe, Your Honor, they are virtually  
2 identical factually in this sense, that in each of them we  
3 have 18 investors who went into a feeder fund, and in some  
4 cases feeder firms but they do vary some but all were  
5 involved in the feeder fund that invested in Madoff either  
6 exclusively or partially.

7 As a result of that they had a niche in  
8 that feeder fund that is different than the other  
9 individual claimants who have also filed suggesting that  
10 they are customers but are in a different multiple  
11 capacity, and let me explain by what I mean in that.

12 They are obviously out there, investor  
13 clubs, there are pension plans, there are profit sharing  
14 plans, there are LLCs. All of those factually are  
15 markedly different than those that are associated with the  
16 feeder fund.

17 The only people, the only claims we are  
18 bringing before Your Honor are those that are currently  
19 associated or are associated with a feeder fund, not any of  
20 the claimants who have been associated with other multiple  
21 investors.

22 The reason for that, Your Honor, is that we  
23 believe the facts are very straightforward and we could  
24 establish that and will through our briefing and  
25 submissions to your Honor with regard to the feeder fund,

1 that will achieve clarity there with regard to at least the  
2 2,000 objections that have been filed, so that we don't  
3 have to deal with them essentially as individual  
4 objections.

5 The other multiple claimants from our  
6 review of the records indicates to us that there will be a  
7 good deal of individual inquiries with regard to each of  
8 them.

9 Without getting into the law with regard to  
10 the subject in any great detail here this morning, Your  
11 Honor, one of the touchstones for a determination of the  
12 customer status other than having a statement is what was  
13 your relationship to the broker-dealer, did you, in fact,  
14 have a relationship, could you direct trades, could you do  
15 things that the normal customers would be able to do.

16 Those factual barriers with respect to the  
17 other multiple claimants we are confident in regard to the  
18 feeder fund that is not the case. As a matter of fact,  
19 all the records that we have seen to date support the fact  
20 that each of these feeder fund investors was involved in  
21 dealing with the feeder fund and not with Madoff, and, in  
22 fact, in some instances or many you would suggest that the  
23 feeder fund is investing in Madoff. So their only  
24 relationship is with the feeder fund.

25 Needless to say, I am not advocating any

1 determination by Your Honor or anyone else with regard to  
2 the Trustee's determination. I am simply suggesting on  
3 the record that we now support the fact we should have a  
4 scheduling order not dissimilar, if you would, from the net  
5 equity scheduling order wherein those 2,000 individual  
6 objections will be dealt with as a group and in a group we  
7 will identify for Your Honor, the following.

8 We will identify each of the feeder funds  
9 with which we believe the investors are associated based  
10 upon the records or documents provided by customers, FINRA,  
11 I should say. The claimant will then be notified, each of  
12 the individual claimants be aware of that.

13 We could provide Your Honor with additional  
14 information so Your Honor would know not only what the  
15 feeder fund but also the individual claims, and certainty  
16 with respect to these feeder funds, we would present Your  
17 Honor with a factual record that would ratify that  
18 information and we would provide Your Honor with  
19 information with regard to the feeder fund, and to the  
20 extent Your Honor requires additional financials, we could  
21 provide that as well.

22 The idea is to provide Your Honor and the  
23 claimant with as full a record as we could with regard to  
24 the feeder fund itself, the claimant's relationship, if  
25 any, to the broker-dealer, Mr. Madoff.

1 At the end of the day we believe we would  
2 be able to present to your Honor a complete record, so that  
3 Your Honor will have before you an adequate record upon  
4 which to determine these 2,000 claims.

5 Needless to say, we have also provided in  
6 our scheduling order for the fact there will be those who  
7 would not agree with us, we understand that. While we are  
8 trying to do this in a way that will be expeditious, we  
9 understand that we should not do it in a way that would  
10 frustrate anyone's rights, and we are not seeking to do  
11 that. We are simply seeking to take what we believe to be  
12 a discrete body of claimants and have them dealt with in an  
13 orderly fashion before Your Honor pursuant to the terms of  
14 the order.

15 With regard to the multiple claimants that  
16 are out there and we have received some increased inquiries  
17 with regard to this, they are in the process of determining  
18 that now. Some have already been determined and denied.

19 What will happen is while we are proceeding  
20 with this, Your Honor, this scheduling order we are seeking  
21 here today, we will be bringing those before Your Honor and  
22 as a matter of fact, probably before we do that, we will  
23 also seek another hearing with Your Honor as to how you  
24 wish to approach that.

25 There will be hundreds of individuals that

1 we believe have to be addressed.

2 One that probably will overburden this  
3 Court's docket and is something we would have to address  
4 with Your Honor and with counsel before we embark on that.

5 But we don't anticipate, Your Honor, those  
6 claims just sitting on the wayside. We are seeing them  
7 moving forward.

8 We understand each claimant's needs to have  
9 an ultimate determination with regard to the claim, and  
10 that they have the right to be here and have Your Honor  
11 look at what the Trustee has done and either confirm or  
12 deny that determination. So we fully understand our  
13 responsibilities and will fully engage with all claimants  
14 with regard to this.

15 What we seek today is the first step  
16 towards dealing with this type of issue, does the customer  
17 actually have an account and this discrete body recommends  
18 a good first start, Your Honor and we will continue to  
19 bring the rest before you in an orderly fashion as they  
20 arise.

21 We have received three written objections.  
22 We have appended them to the papers. We believe two of  
23 them represent direct claimants. You will see that based  
24 upon a review of the record itself. Individuals, perhaps  
25 out of a misunderstanding of what they are trying to

1 achieve here are objecting to the order even though they  
2 are not individuals who are those investors in a feeder  
3 fund. We think they are objecting because they didn't  
4 understanding, quite frankly, what we are trying to do.

5 This order will not affect them. They are  
6 collective claimants and their objections will be heard  
7 individually as we move forward.

8 Another would be Andover, Your Honor, a  
9 classic investor to the feeder fund. These are written  
10 submissions and suggestions that we did not know that the  
11 funds were in Madoff through Andover and he is objecting to  
12 the fact this procedure will be followed.

13 However, I submit to Your Honor, I don't  
14 think the claimant himself fully appreciates what we are  
15 trying to do here and that we are trying to give him his  
16 day in Court and give him his opportunity to be heard.

17 His claim has been denied. That is true.  
18 He is not suggesting an alternative. He is just objecting  
19 to the procedure. But I submit to Your Honor this  
20 procedure will satisfy his need. He will get a hearing.  
21 He will have an opportunity to be heard. His individual  
22 claim, along with all others, will be presented to your  
23 Honor factually specific with regard to Andover. I  
24 believe we will meet his objections in the sense he will  
25 get a hearing. He just wouldn't get an individual hearing



1 as some of the other multiple claimants will.

2 Based upon that analysis of those  
3 objections, Your Honor, I would respectfully submit these  
4 objections should be overruled, and the order submitted to  
5 your Honor should be entered with regard to this particular  
6 objection.

7 I will answer any objections Your Honor may  
8 have.

9 THE COURT: Does anyone to be heard?

10 MS. CHAITMAN: Yes, Your Honor, Helen  
11 Chaitman from the law firm of Becker & Poliakoff for  
12 Maureen Ebbel. And with me here today is my colleague  
13 Peter Smith.

14 I didn't file an objection. I asked Mr.  
15 Sheehan if he would be good enough to provide me with a  
16 list of feeder funds that are the subject of this motion  
17 and he has not done that.

18 I would ask that the Court direct him to do  
19 that because I think there is some accountability and  
20 concern amongst investors as to whether the vehicle in  
21 which they invested is included within the contemplation of  
22 this motion. It is easy to say feeder fund but, in fact,  
23 there are all kind of investment vehicles that Mr. Madoff  
24 encouraged people to utilize and I am not really sure where  
25 the cut off point is on the feeder fund.

1 Since many of these investors are foreign  
2 it will take time for the organization of facts relevant to  
3 their particular issues, and I would simply ask that a list  
4 of the feeder fund be provided to us as quickly as  
5 possible.

6 MR. SHEEHAN: Your Honor, I have no  
7 objection to that. If I failed to communicate this to Ms.  
8 Chaitman, I apologize. We are submitting that list as  
9 part of the application, the complete list of the feeder  
10 fund and the customers associated with those feeder funds  
11 that were contemplated as part of the motion will be filed  
12 as part of the scheduling order I think within two weeks.

13 Everyone will have this.

14 MS. CHAITMAN: Yes.

15 THE COURT: Does anyone else want to be  
16 heard?

17 MR. BELL: Kevin Bell, on behalf of SIPC.  
18 SIPC supports the application as proposed.

19 THE COURT: I have no problem with that.  
20 It isolates a group that has a similar issue. The  
21 definition of feeder fund is something that is a little bit  
22 not clear to me.

23 As Ms. Chaitman points out there are many  
24 types of vehicles that we use to put money into Madoff's  
25 hands.

1 For example, there are institutions that  
2 take money in and then directly put that money into Madoff.  
3 Some of them are banks and some are financial institutions.

4 Is there or is there not a difference when  
5 there is a specific understanding that an institution is  
6 investing with Madoff, so that the investors with the  
7 institutions are considered under either the statute or  
8 case law to be a direct claimant?

9 MR. SHEEHAN: Your Honor, you are  
10 absolutely right.

11 THE COURT: I am not always right, but I am  
12 just curious.

13 MR. SHEEHAN: On this you are absolutely  
14 right. We have been using that term quite honestly in a  
15 very generic way.

16 And the feeder fund is used in a very broad  
17 sense, and I understand Ms. Chaitman's concern as well,  
18 Your Honor. One of the things we want to clarify by this  
19 motion, by identifying the body of feeder funds that we are  
20 talking about here are the ones we are talking about, and  
21 we will define this very specifically for the purpose of  
22 this application as we move forward so everyone will know  
23 to whom this is being addressed.

24 We are addressing those feeder funds such  
25 as the Ascot asset. Your Honor, no banks will be included.

1 No pension funds will be included. No investment groups  
2 will be included.

3 THE COURT: That was the thrust of my  
4 inquiry.

5 MR. SHEEHAN: Pardon?

6 THE COURT: That was the thrust of my  
7 inquiry.

8 MR. SHEEHAN: It will be very discrete.  
9 Even though this will large, it will be a discrete body  
10 legally as to what people commonly refer to as feeder fund,  
11 and we have a very solid description of who they are.

12 THE COURT: Does anyone else want to be  
13 heard?

14 There is no response.

15 MR. SHEEHAN: Thank you, Your Honor.

16 THE COURT: The request for relief is so  
17 ordered.

18 MR. SHEEHAN: Apparently, my order was  
19 also handed up with the earlier order on Surge.

20 THE COURT: It got in the way of my  
21 signature.

22 MR. SHEEHAN: Thank you, Your Honor. I  
23 appreciate it.

24 THE COURT: Next on the calendar of SIPC  
25 versus Bernard L. Madoff Investment Securities.

1 Please proceed, Mr. Sheehan.

2 MR. SHEEHAN: Good morning, Your Honor.

3 This is a return date by an application by  
4 way of an order to show cause before Your Honor concerning  
5 the immediate relief in terms of scheduling of the first  
6 preliminary injunction hearing with regard to a matter  
7 instituted by the Federal District Court of New Jersey by  
8 Ms. Chaitman on behalf of certain individuals who also  
9 happen to be the claimant in this proceeding, which is the  
10 Madoff liquidation proceeding.

11 I just want to make a few points because I  
12 have submitted fairly extensive papers to your Honor, so I  
13 don't want to repeat it all for this hearing.

14 I think it is very important to note that  
15 even though this is different than our previous application  
16 in which we raised the Picard matter, it is different in  
17 the sense that what we have is separate and apart from the  
18 net equity claim which is an allegation of fraud, fraud  
19 against individual directors of the SIPC organizations  
20 through its officers, that in a real sense, at least from  
21 our perspective, and we submit this is accurate, is that we  
22 have a common touchstone that flows through both cases.  
23 That is the decision made by Your Honor with regard to the  
24 net equity allocation dealt with one of the cornerstones of  
25 the arguments that is being made by our adversaries with

1 regard to the 1130 statement.

2 That, Your Honor, is what are the  
3 legitimate expectations of customers. That very  
4 allegation is at the heart of what is the allegation of  
5 fraud in the action currently pending in the District Court  
6 of New Jersey, what were the legitimate expectations of the  
7 customers over time, and what the allegation is that fraud  
8 was being perpetuated, that people were being told they  
9 could rely on the fact that there was \$500,000 worth of  
10 insurance, another critical element of advocacy that you  
11 heard here on February 2, not just from Ms. Chaitman but an  
12 argument was made that the foundation for their argument  
13 was that the history of SIPC as well as an interpretation  
14 of the statute related to a finding on their behalf on the  
15 1130 statement.

16 Now, they are here utilizing the exact same  
17 allegations to suggest that fraud was being perpetrated by  
18 virtue of the conduct of the individuals at SIPC by virtue  
19 of the position of this case, the Madoff case.

20 The problem is this, Your Honor, as I see  
21 it, to reduce it to a number, what if the Federal District  
22 Court Judge decided the net equity differently, decided  
23 that the legitimate expectation had some foundation.  
24 That, in fact, that the 1130 statements should, in fact, be  
25 the one that is followed here.

1 That, yes, the SIPC Trustee was wrong, but  
2 forget that, worse than that, these folks engaged in fraud.  
3 I think there would be an appeal, Your Honor. I think  
4 that it would be in the Third Circuit. But on what? The  
5 net equity calculation?

6 That fact alone dictates the outcome here  
7 this morning. How could that possibly happen? There is  
8 no more core issue in this entire case than the net equity  
9 calculation.

10 Everything we do flows from it. How can  
11 we allow another courtroom, however revered, it does not  
12 matter? That is not the point. It doesn't matter it is  
13 their circuit. We should have only one Court deciding  
14 this matter, this Court. This Court has jurisdiction over  
15 that issue.

16 Yes, subject to a review by the Second  
17 Circuit, but it is this Court who makes that decision.

18 THE COURT: I certified that issue to the  
19 Second Circuit.

20 MR. SHEEHAN: Of course, you have. And  
21 there is a petition hoping that they will expedite it for  
22 them to respond to us quickly and we will have that  
23 quicker. We should not be having dual circuits on that  
24 issue. That alone tells us this case should not move  
25 forward.

1                   Why are we seek a TRO.    The reason we are  
2   seek a TRO, as the record reveals this case is moving in  
3   New Jersey with some degree of alacrity.  There are motions  
4   being contemplated by the government; there are motions  
5   being contemplated by the SIPC board members.  And as Judge  
6   Magistrate Judge Schwartz made clear, there will be no stay  
7   of discovery.  This case is going to move forward.  We  
8   like things, as they say in the transcript, we like to keep  
9   things percolating at a hearing, Your Honor.

10                  One thing we can't have happen is that case  
11   percolating in New Jersey while we are moving forward in  
12   this courthouse, and in the second circuit with regard to  
13   the very issues which are the gravamen of what is being  
14   amassed in New Jersey.  That simply cannot happen.  The  
15   only way to preserve the integrity of this Court is to shut  
16   that down, plain and simple.  It has to be shut down now  
17   so we don't have any untoward activity taking place to  
18   protect everyone who is a party to that proceeding.

19                  Until Your Honor has a full record, to give  
20   Ms. Chaitman an opportunity to be heard on the papers, we  
21   will have a hearing on the preliminary injunction.  I am  
22   very, very confident that we will succeed on that.

23                  I think on all of the elements that are  
24   associated with the imposition of temporary relief, we are  
25   in accord with every one of them and that relief should be



1 granted here as well.

2 Thank you, Your Honor.

3 MS. CHAITMAN: Mr. Peter Smith will be  
4 handling this issue, Your Honor.

5 THE COURT: Sure.

6 MR. SMITH: Good morning. Let's first  
7 address the numbers that Mr. Sheehan mentioned. I fail to  
8 see how a District Court decision on what net equity  
9 determines or if it were different would affect anything  
10 that happens here.

11 Throughout these papers it talks about  
12 confusion, and it will affect the administration and  
13 liquidation. Who will be confused that Your Honor issued  
14 the decision that he did?

15 Certainly Your Honor will not. Mr.  
16 Sheehan will. It will not affect how any customer  
17 property is distributed here, even if that were to happen.

18 But as to the TRO there is no immediate  
19 harm that anyone is going to suffer between now and when  
20 Your Honor hears this.

21 I was on the call with Judge Schwartz about  
22 the stay of discovery. She said there will be no stay of  
23 discovery.

24 But no discovery will happen because Judge  
25 Schwartz has not issued the order directing the initial

1 conference in the case.

2                   Until that happens there wouldn't even be  
3 mandatory disclosures under Rule 26. Nothing will happen  
4 between now and when Your Honor hears the preliminary  
5 injunction motion that is part of this application. There  
6 is nothing immediate, no harm.

7                   I suggest there is not even any harm that  
8 they have identified.

9                   They basically write the motion to dismiss  
10 for the defendants in their papers, Your Honor. They  
11 argue that any decision of net equity that could be made in  
12 the District Court would be foreclosed on by a  
13 persuasiveness by Your Honor's decision, if not collateral  
14 estoppel. So where is the harm? There is no harm that  
15 would be suffered by anyone with this case proceeding.  
16 Certainly not between now and when Your Honor hears the  
17 preliminary injunction motion.

18                   I further submit they have not established  
19 a serious question in this case.

20                   The brief they submitted regurgitates what  
21 they said in the Picaeur agreement. This is not a serious  
22 question here because of the cases they cite talk about the  
23 Court's staying the third-party actions that might  
24 implicate every estate property.

25                   There is no estate property implicated by

1 the New Jersey action, Your Honor.

2 The other cases they cite talk about  
3 enjoining third-party actions where the alter ego of the  
4 Debtor is somehow involved, but that is also not the case  
5 here.

6 These are individuals who have been sued in  
7 New Jersey.

8 There is no question, Your Honor, that you  
9 will deny this preliminary injunction motion. So,  
10 therefore, there is no basis for issuing the TRO today.

11 THE COURT: Thank you. Does anyone else  
12 want to be heard?

13 MR. EHRLICH: Good morning, Your Honor. My  
14 name is Jeff Ehrlich, I am a trial attorney for the  
15 Department Of Justice. I don't want to get too much into  
16 the middle of this, but I will note that the United States  
17 Trustee is one of the percolators of the New Jersey case.

18 Two of the defendants in this case are SIPC  
19 directors who are federal employees and under Federal tort  
20 claims action, the United States Trustee is only the proper  
21 defendant in a lawsuit that alleges a violation of state  
22 law involving actions of federal employees. So we filed a  
23 motion to substitute the United States as a defendant in  
24 the New Jersey action in lieu of two of the current  
25 defendants and for our interests here, obviously, we would

1 support a restraining order and injunctive relief certainly  
2 if it meant dismissal of the New Jersey case where the  
3 United States is a defendant. But today the main interest  
4 that we have is that we would like to avoid a situation  
5 where the New Jersey action is in some way stayed  
6 indefinitely with the two individual federal employees  
7 remaining as defendants. We would like to have the  
8 pending motion to substitute decided before any type of  
9 permanent injunction is entered if the Court were inclined  
10 to do that.

11 THE COURT: Thank you.

12 MR. EHRLICH: Thank you, Your Honor.

13 THE COURT: I have read all of the papers  
14 including the transcripts of hearings before the Magistrate  
15 in New Jersey.

16 I understand it is a matter of policy the  
17 need to keep cases moving and to percolate by not staying  
18 discovery. However, I don't know that determination is a  
19 matter of administrative policy is always well thought out  
20 when the unintended consequences could cause severe  
21 dislocation.

22 Nevertheless, I tend to agree with the  
23 opponent to the request for a Temporary Restraining Order  
24 here that the request for that Temporary Restraining Order  
25 is not as robust as it could be. I see nothing in these

1 papers that shows that this discovery at this point in time  
2 has a direct impact on the proceedings before me.

3 The nature of the discovery is not clear.  
4 I understand there is a motion practice that could be made  
5 before the New Jersey Court and it may very well be when  
6 everyone sits back and sees what all of the issues are that  
7 a proper determination will be made.

8 But as far as the request for a Temporary  
9 Retraining Order today, I don't see the U.S. Trustee has  
10 made a case for that.

11 The defendants in the New Jersey action are  
12 not the defendants here.

13 The allegation that this is a collateral  
14 attack on the determination of this Court, that the same  
15 parties in New Jersey are already partisans to the  
16 appellate practice here in the Second Circuit, and that  
17 many of issues that are raised in the New Jersey proceeding  
18 are already subject to appeals and briefing in the Southern  
19 District of New York.

20 Nevertheless I do not see that the nebulous  
21 kind of discovery that is pointed out to me here in any way  
22 deserves a stay from this Court where the issues of the  
23 stay, it may have the potential of pitting Court against  
24 Court, which I think is not an appropriate situation at  
25 this point in time.

1                   There are other avenues if one wants to  
2                   entertain another Court. But when parties are put before  
3                   a Court with a compulsion to submit to discovery, if this  
4                   Court were to stay the party from cooperating with that  
5                   order, it does have the affect of pitting Court against  
6                   Court.

7                   I agree with the opposition here that a  
8                   preliminary injunction hearing is the appropriate way to go  
9                   and pending that, there has been not enough shown to me to  
10                  require a Temporary Restraining Order.

11                  MR. SHEEHAN: Fine, Your Honor, thank you.

12                  MS. CHAITMAN: Your Honor, can we work out  
13                  a schedule for discovery before we have the preliminary  
14                  injunction hearing?

15                  THE COURT: Well, let me hear from the  
16                  United States Trustee because among other things there are  
17                  events here in New Jersey that may be preemptive to any of  
18                  your requests for discovery.

19                  MS. CHAITMAN: I am talking about a  
20                  discovery for a preliminary injunction hearing.

21                  THE COURT: I understand that.

22                  MR. EHRLICH: I don't know if you have a  
23                  question I could address for you.

24                  THE COURT: There is a question posed by  
25                  Ms. Chaitman as to the scheduling of discovery in

1 connection with the preliminary injunction. Since I am  
2 not fully aware of the kind of discovery that is  
3 contemplated in New Jersey, we don't want to have a  
4 discovery foray that has everyone scattered all over the  
5 place.

6 MR. EHRLICH: I don't mean to speak for Ms.  
7 Chaitman. I think she is talking about discovery in this  
8 Court on the preliminary injunction.

9 THE COURT: I understand.

10 MR. EHRLICH: In the New Jersey action, the  
11 scheduling or is not issued yet and there is no discovery.

12 What is pending now in the New Jersey  
13 action is the motion to substitute the United States  
14 Trustee for two of the defendants.

15 There are still other individual defendants  
16 who at any moment a scheduling order could issue and we  
17 would be subjected to discovery. I think that is what  
18 prompted the motion by the Trustee today.

19 THE COURT: Very well. Mr. Sheehan, do  
20 you have an order on the preliminary injunction before me?

21 MR. SHEEHAN: I don't understand what  
22 discovery is being requested here. Ms. Chaitman and I  
23 could talk. I don't see any need for discovery. I think  
24 we need a hearing.

25 THE COURT: I think the appropriate thing

1 to do is to set down a hearing date.

2 MR. SHEEHAN: All right. We will work  
3 out a hearing date.

4 THE COURT: I will adjust the request, if  
5 you wish to it.

6 MR. SHEEHAN: We will submit it to your  
7 Honor.

8 THE COURT: All right.

9 MR. SHEEHAN: We will work out a schedule  
10 and do it that way.

11 MR. SMITH: Thank you Your Honor.

12 MR. SHEEHAN: Thank you.

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C E R T I F I C A T E

STATE OF NEW YORK            }  
  }       ss.:  
COUNTY OF NEW YORK        }

I, MINDY CORCORAN, a Shorthand Reporter  
and Notary Public within and for the State of New York, do  
hereby certify:

That I reported the proceedings in the  
within entitled matter, and that the within transcript is a  
true record of such proceedings.

I further certify that I am not related, by  
blood or marriage, to any of the parties in this matter and  
that I am in no way interested in the outcome of this  
matter.

IN WITNESS WHEREOF, I have hereunto set my  
hand this 14th day of April, 2010.

\_\_\_\_\_  
MINDY CORCORAN